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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 575

E. E. CONNER, ET AL.,
Petitioners,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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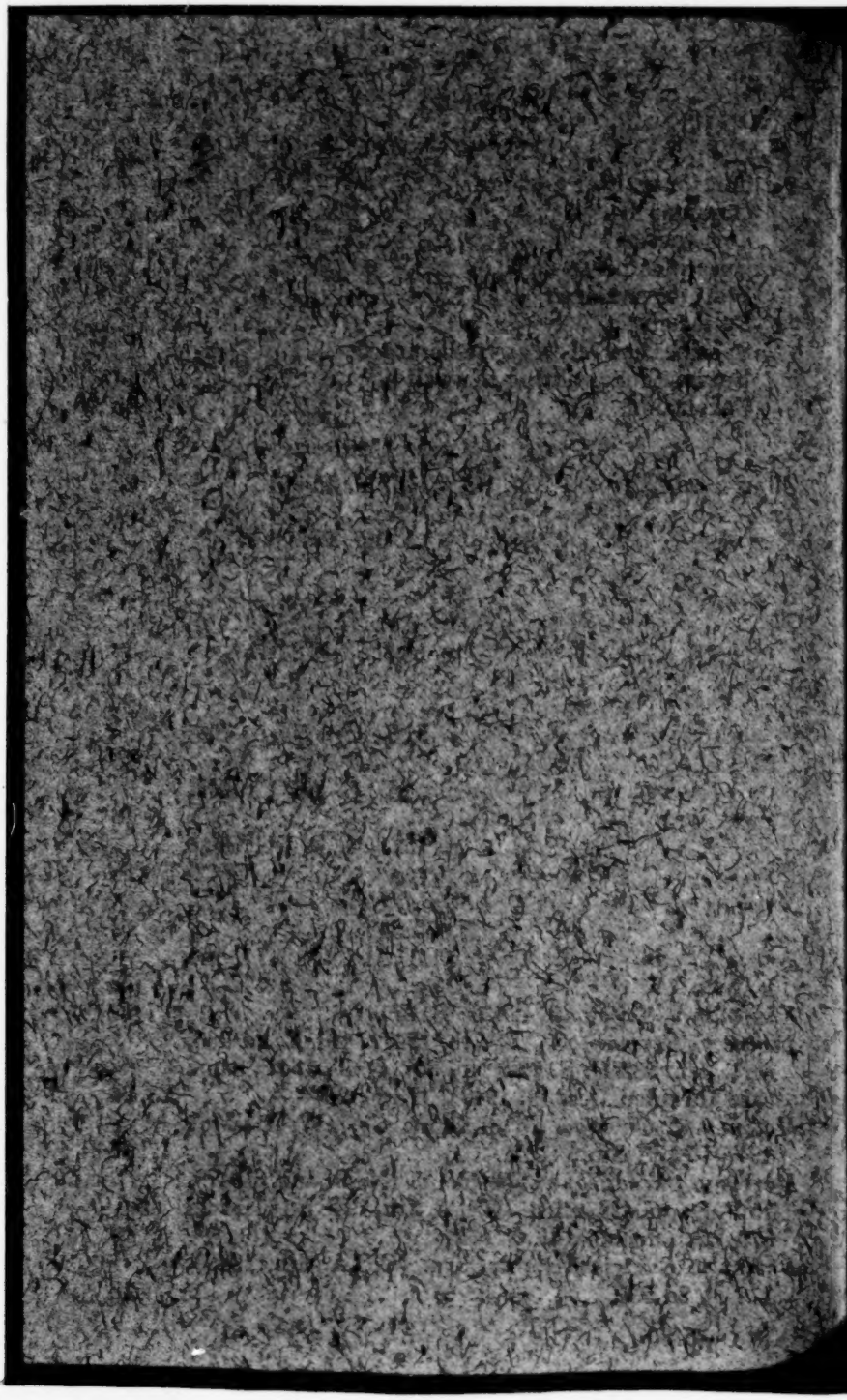

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	6
Specification of errors to be urged	13
Reasons for granting the writ	14
Conclusion	25

Table of Cases Cited

Allyn v. *Abad* (C.C.A. 3d, 1948), 167 F. 2d 901	23
Anderson v. *Yungkan*, 329 U. S. 482	21
Boston & M. R. R. v. *David* (C.C.A. 1st, 1948), 167 F. 2d 722	17, 20
Colby v. *Reed*, 99 U. S. 560	20
Eaton v. *Atchison, T. & S. F. Ry. Co.* (U.S.D.C. Kan., 1948), — F. Supp. —, 14 Lab. Cases No. 64463	18
Escoe v. *Zerbst*, 295 U. S. 490	21
Ex parte Jordan, 94 U. S. 248	21
Fishgold v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275	15
Freeman v. *Gateway Baking Co.* (D. C. Ark., 1946), 68 F. Supp. 383	19
Harrison v. *Seaboard A. L. R. Co.* (E. D. So. Car., 1948), 77 F. Supp. 511	18
Hewitt v. *System Fed. No. 152 Ry. Emp. Dept. A. F. L.* (C.C.A. 7th, 1947), 161 F. 2d 545	15
John S. Doane Co. v. *Martin* (C.C.A. 1st, 1947), 164 F. 2d 537	22
Kaufman v. *Tredway*, 195 U. S. 271	19
Levine v. *Berman* (C.C.A. 7th, 1947), 161 F. 2d 386, cert. den. 332 U. S. 792, No. 307, O. T. 1947; same case (decided Dec. 19, 1949), 178 F. 2d —	23, 24
Maloney v. *Chicago, B. & Q. R. Co.* (W. D. Mo., 1947), 72 F. Supp. 124	17, 18
Morris v. *Chesapeake & O. R. Co.* (N. D. Ind., 1947), 75 F. Supp. 429, aff'd. (C.C.A. 7th, 1948), 171 F. 2d 579, cert. den. 336 U. S. 967	19
Nevins v. *Curtiss-Wright Corp.* (C.C.A. 6th, 1949), 172 F. 2d 535	18

Page

Oil Workers Int. Un. C.I.O. v. *Sinclair Ref'g. Co.* (C.C.A. 5th, 1948), 171 F. 2d 192 17
Railroad Co. v. *Hecht*, 295 U. S. 168 21
Raulins v. *Memphis Union Station Co.* (C.C.A. 6th, 1948), 168 F. 2d 466 ..... 16, 17
Schreier v. *M. H. Fishman Co.* (C.C.A. 3d, 1948), 176 F. 2d 722 23
Spalding v. *Mason*, 161 U. S. 375 20
Spearmon v. *Thompson, Trustee Mo. Pac. Ry. Co.* (C.C.A. 8th, 1948), 167 F. 2d 626, cert. den. 335 U. S. 822 and 335 U. S. 886 ..... 16, 19
Special Service Co., Inc. v. *Delaney* (C.C.A. 5th, 1949), 172 F. 2d 16 ..... 17, 23
Storm v. *Boker*, 150 U. S. 312 20
System Fed. No. 30, Ry. Emp. Dept. A. F. L. v. *Baltimore & O. R. Co.*, Award No. 1187 Nat. R. Adjustment Bd., 2d Div., Docket No. 1114 18
Trischler v. *Universal Potteries, Inc.* (S. D. Ohio, 1947), 78 F. Supp. 609, aff'd. (C.C. A. 6th, 1948), 171 F. 2d 707 17
Trusteed Funds v. *Dacey* (1947), 160 F. 2d 413 20
United States ex rel. Siegel v. *Thoman*, 156 U. S. 353 21
Van Doren v. *Van Doren Laundry Service* (C.C.A. 3d, 1947), 162 F. 2d 1007 24
Watkins Motor Lines, Inc. v. *De Galliford* (C.C.A. 5th, 1948), 167 F. 2d 274 25
Willoughby v. *Atchison, T. & S. F. Ry. Co.* (U. S. D. C. Kans., 1948), — F. Supp. —, 14 Lab. Cases No. 64464 18
Work v. *Lynn*, 266 U. S. 161 21

STATUTES CITED

Selective Training and Service Act of 1940 (50 U.S.C. § 308; c. 720, 54 Stat. 885) 3, 6, 14, 22
Selective Service Act of 1948, c. 625, 62 Stat. 604 14
Army Reserve and Retired Personnel Service Law of 1940, c. 689, 54 Stat. 858 6
Act of June 23, 1943, for Civilian Reemployment of Members of Merchant Marine, § 3, c. 142, 57 Stat. 162 (50 U.S.C. Appendix § 1473), as amended 6
Judicial Code, § 1254 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 575

R. E. CONNER, KENNETH L. KNITTER, AND VINCENT L. PETENBRINK, SUING ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, *Petitioners,*

vs.

THE PENNSYLVANIA RAILROAD COMPANY, BROTHERHOOD OF RAILROAD TRAINMEN, H. F. SITES, A. F. WHITNEY, E. W. WILSON, CHARLES F. PUSEY, J. H. ALLERS, JOSEPH M. DECKER, C. A. LEATHERS, JR., E. R. BRISCOE, J. E. BERBIG, F. G. MEADOWCROFT, C. H. GITTINGS, W. F. HARRISON, NATHAN BERKMAN, J. M. PARKER, EARL R. DEANER, B. J. SHANKWEILER, I. E. WAGNER, H. F. HANNY, W. A. SCOTT, H. W. HIGHFIELD, R. E. SATTERFIELD, SANFORD R. HALLIDAY, L. C. LECOMPTE, E. D. SAXTON, AND CLIFTON K. AREHART, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners R. E. Conner, Kenneth L. Knitter and Vincent L. Petenbrink, suing on behalf of themselves and all

others similarly situated, respectfully pray that a writ of certiorari issue in the above-captioned case to review the judgment of the United States Court of Appeals for the District of Columbia Circuit rendered therein August 1, 1949, R. 73, petition for rehearing denied October 5, 1949.

Opinions Below

The opinion of the District Court of the United States for the District of Columbia appears at pp. 60-62 of the record, and is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported in 177 F. 2d 854, and in 16 Labor Cases ¶ 65,276. It appears in the record at R. 65 to 72.

Jurisdiction

The jurisdiction of this Court is invoked under § 1254 of the Judicial Code.

The court of appeals denied a petition for rehearing with a memorandum (R. 84) on October 5, 1949. Time within which the petition for writ of certiorari might be filed by these petitioners was extended by order of Mr. Chief Justice Vinson on December 29, 1949, to and including February 2, 1950 (R. 90).

Questions Presented

1. Whether the employer, consistently with the Selective Training and Service Act of 1940, may reduce the seniority of petitioner veterans through transfer to petitioners' seniority roster of other veterans with retroactive seniority for the time of their war service, thus placing them ahead of petitioners, (a) where respondent veterans might have exercised an election to transfer prior to their entry into military service but neither did so nor indicated any interest in such transfer, (b) where respondent veterans had been carried and advanced on a different roster during their

war service and accorded a right to reemployment on that roster, and (c) where such predating of transfer is not, either by custom or collective-bargaining agreement, saved to employees on furlough or leave of absence.

2. Where the court has held that the employer has wrongfully withheld from petitioners a similar right to transfer to another roster with retroactive seniority and has also expressly found that no prejudice has resulted to the employer by the petitioners' failure earlier to demand this specific remedy, (a) whether petitioners are entitled to compensatory damages for their loss resulting from the employer's wrongful action; (b) whether to the extent that the grant of damages in such instances is discretionary, the discretion in the first instance can be exercised by a United States court of appeals; and (c) whether the attempted exercise of discretion respecting damages by the court below on review of a summary judgment which it finds to have been entered improperly—the motion for summary judgment itself in nowise having been directed at the question of damages and the court of appeals acting without brief, argument or evidence—constitutes an abuse of discretion.

Statutes Involved

The Selective Training and Service Act of 1940 (50 U. S. C. § 308; c. 720, 54 Stat. 885, §8, as amended) provides:

> "(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) [section 303 (b) of this Appendix] shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who

is inducted into the land or naval forces under this Act for training and service shall be given a physical examination at the beginning of such training and service; and upon the completion of his period of training and service under section 3 (b) [section 303 (b) of this Appendix], each such person shall be given another physical examination and, upon the written request of the person concerned, shall be given a statement of medical record by the War Department: *Provided,* That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary of War or the Secretary of the Navy would prove injurious to the physical or mental health of the person to whom it pertains.

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * *

"(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided,* That no fees or

court costs shall be taxed against the person so applying for such benefits.

Statement

Petitioners are three class suitors who are employees of The Pennsylvania Railroad Company on its Maryland Division who filed this action in the court below on behalf of themselves and other employees similarly situated, under the reemployment provisions of the Selective Training and Service Act of 1940, § 8(b), (c), c. 720, 54 Stat. 885, 891 (50 U. S. C. Appendix § 308[e]) (R. 11). Petitioners sought a declaratory judgment, injunction, accounting, and money judgment for their damages in accordance with the act (R. 23-24). Respondents are the employer The Pennsylvania Railroad Company (referred to throughout as the "Railroad") and the Brotherhood of Railroad Trainmen (referred to as the "Brotherhood"), its general manager and president, and 23 individual employees of the Railroad, whose employment with the seniority accorded to them it is alleged has unlawfully diluted the seniority of petitioners and members of their class upon the employment roster of the Railroad from which all of the trainmen, parties to this action, are employed. All of the trainmen, respondent or petitioner who are parties to this action are returned ex-servicemen who are protected by the provisions of the Selective Training and Service Act of 1940, above, or the identical provisions of two other statutes.[1]

The case arises out of the fact that two separate rosters for trainmen are maintained on the Maryland Division of the Pennsylvania Railroad where all of the trainmen parties are employed. One roster governs the employment

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[1] The Army Reserve and Retired Personnel Service Law of 1940, § 3, c. 689, 54 Stat. 858,860 (50 U. S. C. Appendix § 403[d]), as amended; and the Act of June 23, 1943, for Civilian Reemployment of Members of Merchant Marine, § 3, c. 142, 57 Stat. 162 (50 U. S. C. Appendix § 1473), as amended.

of passenger trainmen, the other that of freight trainmen. All of the trainmen parties to this action now appear on the passenger-trainmen roster; and the first alternative cause of action is directed to the proposition that respondent trainmen have been placed on that roster ahead of some of petitioner trainmen, or members of the class represented by them. (R. 18-19.)

Work as trainmen for respondent Railroad is not performed off the two rosters indiscriminately; a sharp freight and passenger discrimination exists, to the extent that there is no right to work in passenger service if one appears on the freight roster, and *vice versa*. With reference to current employment and excepting for a privilege to apply and be considered for transfer upon the occurrence of vacancies, the two employments are as completely alien as though they were for two separate employers. (¶ 12, R. 17-18.) Right of *promotion* exists only within the particular roster, and is entirely distinct from the question of *transfer*. (*Id.*)

The present dispute arises out of transfers from one roster to the other. The collective-bargaining agreement between respondent Railroad and respondent Brotherhood (as collective-bargaining agent under the Railway Labor Act) provides (R. 15):

> "1-D-3. (a) On a seniority district where, on the effective date of this Agreement, it is the practice to employ trainmen for passenger, or freight or yard service exclusively, when additional passenger trainmen are needed the applications of freight and yard trainmen on the said seniority district shall be given consideration, after which the applications of switchtenders on that seniority district shall be considered.
>
> "(b) When additional freight and yard trainmen are required on a seniority district where the practice referred to in paragraph (a) is in effect, the applications of passenger trainmen shall be given consideration,

after which the applications of switchtenders on that seniority district shall be considered.

"(c) Notice shall be published on bulletin boards giving the said trainmen and switchtenders reasonable time within which to file their applications."

It will be noted that there is thus a right of transfer from freight to passenger service as well as a right to transfer from passenger to freight service. It has been the practice of respondent Railroad ordinarily to employ trainmen first in the freight service, and to draw its passenger trainmen from the freight roster as freight trainmen applied whom it regarded as qualified (R. 42, 45, 46). This has not been an inveterate custom; for a number of passenger trainmen in the total group involved in this action never were employed on the freight roster and therefore have no "freight roster date" (R. 55-58). Asserted custom aside, the right of transfer is and has been contractual, as above quoted from the underlying collective-bargaining agreement, which was adopted August 14, 1942, and has since been amended (and so, as to unamended provisions, ratified) from time to time in respects herein immaterial (R. 14) (and see Exhibit A to the amended complaint in the unprinted record). In other instances, the employment on the freight roster was *pro forma*, since the same day or within a few days after entry upon the freight roster, the men involved were shown to have transferred to passenger service [2] (R. 55-58).

Upon a transfer, the collectively-bargained agreement provides (¶ 3-F-1, R. 16) that the transferring trainman shall acquire seniority on the new roster *from the date of transfer*.

---

[2] One of the named appellants, Petenbrink, was engaged on the freight roster on February 17, 1943, and was transferred to passenger service February 18, 1943 (R. 58, No. 302; 52). Numerous other examples are apparent from an inspection of respondent Railroad's list of persons involved and their passenger and freight dates (R. 55-58).

The collective-bargaining agreement also provides for exercising seniority "on an assignment or pool advertised and filled during" the absence on sickness, suspension, or leave of absence, but does not save the right of *transfer* which may have arisen during the furlough or absence; although even the right to exercise seniority on an assignment or pool is not saved if an absence is for thirty days or more. The agreement (the full provisions of which are in an exhibit lodged with the clerk) provides in these respects.

> "2-A-3. (a) A trainman returning to duty after being absent less than thirty days by reason of sickness, temporary disability, suspension, or leave of absence, shall be permitted to exercise his seniority on an assignment or pool advertised and filled during his absence, provided he exercises such right before he performs any road or yard service.
>
> "(b) A trainman who has been absent for any of the causes enumerated in paragraph (a) for a period of thirty days or more, upon his return to duty may exercise his seniority on any assignment or pool."

When various employees of the Railroad went into the military services during the war, it was assured to them under § 8 of the Selective Training and Service Act of 1940 that they would maintain their seniority with all rights and benefits which they would have had had they not been called into the service (R. 18). This has been interpreted to mean (see argument, post) that their names are retained on the seniority roster and advanced just as if they were not in the military service. And so here: those of the trainmen parties who appeared on the freight roster when they went into the service had their names retained on the freight roster and were advanced upon it as though actively engaged in the railroad work during all of the time they were in the military service. The same was true of the passenger

trainmen, who were similarly advanced on the passenger roster. Each might come back to his employment and find himself in the same relative position as when he left (R. 18-19).

But, upon their return from service, freight trainmen veterans were accorded an opportunity either to renew their freight employment with seniority accrued during their service, or to transfer to the passenger roster and assume passenger seniority—not from the date of transfer (as provided by the collective-bargaining agreement, ¶ 3-F-1, R. 16), but from a time which would place them ahead of the immediate junior freight or yard man accepted for passenger service after such freight trainmen entered into military service (R. 19). As shown by the Railroad's list, this yields the same result as if the transfer were as of the day each was furloughed for military service (R. 55-58). Those returning ex-servicemen on the freight roster who elected to transfer to the passenger roster, with accrued seniority during their service, are the trainmen respondents here. Petitioner passenger trainmen and members of the class represented by them were not accorded the equivalent right to transfer to the freight service with freight seniority accrued during the time they went into the service (R. 22). With the exception of one of the transferring respondent trainmen, none of them transferred actually at a time when vacancies existed on the passenger roster; and their applications for transfer were not submitted in response to notice as provided in Rule 1-D-3(c) (quoted R. 15) (R. 19).

The complaint prayed relief in the alternative. The first alternative cause of action complains that the respondent trainmen were allowed to transfer at all, since no vacancies existed; or, if transfer was proper, that they were placed on the roster as of a time earlier than their actual transfer; that in effect a double seniority was granted to respondent

trainmen when they returned from the service, thus *pro tanto* reducing the seniority of petitioners on the passenger roster, contrary to the Selective Training and Service Act. The second alternative cause of action, in the event the first one is held unfounded under the Selective Training and Service Act, asks that equivalent opportunity of elective seniority on the freight roster be tendered to petitioners (R. 22).

The complaint R. 21-22, asserts the grave and irreparable injury of petitioners and members of their class, the denial to them of employment in more desirable occupations, and the fact that some of them have and hereafter may be forced to abandon their occupation as trainmen to enable them to support and maintain themselves and their families. The complaint asks alternatively that (1) defendants be enjoined from maintaining the transferring freight trainmen upon the passenger roster or else from maintaining them upon that roster with a seniority dated earlier than the day as of which they actually transferred to passenger service; or (2) that the Railroad tender petitioners an opportunity to transfer to the freight roster with seniority equivalent to that which was accorded to respondent trainmen on the passenger roster, together with a tender of damages incurred through the Railroad's having failed to accord them an opportunity so to transfer following their return from military service. The complaint asks an accounting and damages.

Following the filing of the amended complaint R. 11, respondents moved to dismiss for failure to state a claim upon which relief can be granted, or in the alternative to enter a summary judgment (R. 31, 40). The district court granted both motions for summary judgment, both as to petitioners' original and alternative causes of action (R. 62-63).

That court considered that the right of transfer to the passenger roster was a valuable right which the freight trainmen might exercise had they not been in military service; that they would have availed themselves of the right had they not been absent in the service; that the Selective Training and Service Act therefore assured them the choice, which they had missed. Conversely, he felt that petitioner passenger trainmen would not have elected to exercise their right of transfer to the freight list and, therefore, they had no valuable right to be vindicated under the alternative requests for relief (R. 60-62). Petitioners have serious challenge of some of the statements of fact or the speculations of fact indulged by the learned Chief Justice of the district court, though we forebear a dissertation upon those errors at this time.

The court of appeals affirmed respecting the first cause of action and reversed as to the alternative. (Opinion of Prettyman, J., R. 65 to 72.) It held that the effect of § 8 (c) of the Selective Training and Service Act is to require that one who enters the military service must be given, upon his return, the same seniority which he would have had had he not been in the service; and that the opportunity to transfer by election of the employee was a privilege which he would have had had he not been in the service, so that it was proper to accord the retroactive seniority to the time when the transfer might have been availed of when the opportunities arose during the absence of the trainmen. It held that exactly the same rule which applies to returning veterans on the freight list applies also to petitioners, so that petitioners had wrongfully been denied an opportunity of transfer to the freight roster. Although the court held (R. 71) that "There is no showing that appellants' [earlier] failure to seek the proper relief resulted in any injury to the Railroad", it denied damages and an accounting (which had been prayed for in the complaint) on the theory that

petitioners had never demanded a transfer to the freight roster, and that it would be harsh to permit a service man to return to his job, keep silent for an extended period of time, even though fully aware of the circumstances, and then claim damages from his employer for his failure to offer him a right to a different job for which he never applied.

The issue of damages, in the event petitioners were entitled to transfer, was neither briefed nor argued to the court. By petition for rehearing, petitioners protested the ruling on the point in the absence of a hearing, and especially that there was a demand not later than the time when the amended complaint was filed; that a demand would have been refused in any event, so that it was not a prerequisite; that a demand had actually been alleged; that petitioners had not stood by idly with full knowledge of their rights, since the right to transfer had been studiously kept from petitioners by all of the respondents (as shown by various allegations of the complaint and by the affidavits); and finally that petitioners had made the sort of demand for reemployment which the Selective Training and Service Act expressly requires, which is all that the court might insist upon. The petition for rehearing was denied with a brief opinion *per cumiam* (R. 84). The court justified its action in disposing of the question of damages without brief or argument to that court on the ground that the alternative claim in the complaint asserted not only the right to transfer but the right to damages.

Specification of Errors To Be Urged

1. The court erred in holding that respondent trainmen were entitled, under the Selective Training and Service Act, to transfer to the passenger roster with seniority antedated as of a time shortly after they left for the service.

2. The court erred in denying petitioners damages and an accounting on their alternative cause of action which it sustained.

3. The court erred in passing on the issue of damages and an accounting in connection with the alternative cause of action.

4. The court erred in failing to hold petitioners entitled to relief under their first alternative cause of action.

Reasons for Granting the Writ

1. *Respondent trainmen were wrongfully accorded the right to transfer with seniority antedating that of petitioners; and the decision below is in conflict with the decisions in other circuits.*—The question of the right of a returning serviceman to return to the job which he left to enter the service, or to take some other job which he desires even though the job he left is available and his seniority has been maintained unimpaired in that position, is one which has frequently confronted the courts under the Selective Training and Service Act of 1940, and is of continuing importance under the Selective Service Act of 1948, c. 625, 62 Stat. 604, 615, § 9 (b) (B), (c), which renews the provisions as to a return to employment to "such position" as the veteran left. The present decision does not follow the line which has gradually become clearly established in the opinions of the various circuits.

The decisions have consistently interpreted the question whether the position to which the returning veteran aspired was "such position" as he left. The decision of the court below would be consistent with the existing decisions if this were a case where the rosters were tandem, so that reaching the top of one would permit the employee to go to the bottom of the other. In such case, the veteran would

reach the superior roster merely with the lapse of time; and it is part of his seniority right, protected by § 8 (c) of the Act, to go on the superior roster. As this Court stated in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 287, "the 'position' to which the veteran is restored is the 'position' which he left plus cumulated seniority".

In this case, the rosters are not tandem, so that either passenger or freight service is superior to the other; a man may well be content to spend his entire life in one or the other service; and in fact, where petitioners and members of their class transferred from freight to passenger, it usually was at the earliest opportunity after they were employed in the freight service (R. 55-58). Thus, it follows that the greater the freight seniority the less interest to transfer to passenger service. And in this case, with only one or two exceptions, every one of the twenty-three respondent trainmen (whose names are starred at R. 56-58) repeatedly passed up opportunities to transfer prior to the time he went into the service. This case, therefore, is like the cases next cited below, in each of which the returning veteran was held not to be entitled to transfer to the different roster with seniority antedated to a time while on furlough to military service. The decision below conflicts with these cases:

Hewitt v. *System Federation No. 152 Ry. Employees' Dept. A. F. L.* (C. C. A. 7th, 1947), 161 F. 2d 545, where the veteran missed an opportunity to be employed as a carman helper while away to the service with his seniority maintained on the car-cleaners roster. There, "the position" which he left was the position as car cleaner. Just so here: "the position" which respondent trainmen left was a position on the freight roster. On that roster their seniority was maintained unimpaired throughout their war service. To that roster they might properly return without impairing and diluting the seniority of petitioners.

Raulins v. *Memphis Union Station Co.* (C. C. A. 6th, 1948), 168 F. 2d 466. The veteran left the roster as electrician helper, and upon return, aspired to be an electrician. As in the present case, there were provisions of the collective-bargaining agreement for announcing vacancies on the electrician roster to helpers and giving helpers "preference" in filling them. And also as in the present case, there was no provision saving such rights to electrician helpers who were on furlough. The court of appeals held that it was improper to require advancement of the returning veterans to the other roster with seniority back-dated to the time the man junior to them on the helper's roster had been advanced during the time the veterans were in the service.

Spearmon v. *Thompson, Trustee Mo. Pac. Ry. Co.* (C. C. A. 8th, 1948), 167 F. 2d 626, cert. den. 335 U. S. 822, No. 148, O. T. 1948 (sub nom. *Thompson, Trustee* v. *Spearmon*) and 335 U. S. 886, No. 359, O. T. 1948 (sub nom. *Delozier* v. *Thompson, Trustee*); opinion on rehearing, 173 F. 2d 452. This case involved four men who had seniority as carmen helpers, where the collective-bargaining agreement provided when there were positions available for mechanics, helpers might be advanced to mechanic and paid mechanic's rates, but would not earn seniority as mechanics until three years on the mechanic job. One was inducted before being transferred to mechanic's work under the temporary arrangement. Three were transferred from a few weeks to 1½ years prior to induction into the service. Upon return from the service, all were first reinstated to the mechanics' roster and thereafter returned to the carmen helpers' roster. The court held as to the three who had actually transferred before going into the service that the mere passage of time entitled them to seniority as mechanics; otherwise as to the one who had not transferred to the work of a mechanic, even though had he remained in

the position of helper until reached in his turn, he would have been advanced. Accordingly, he was properly returned to "the position" he left—as a helper. The same rule would require the respondent trainmen here to be returned to their position on the freight roster, without the right to reduce or dilute petitioners' seniority which had been accruing while petitioners were in the service.

Special Service Co., Inc. v. *Delaney* (C. C. A. 5th, 1949), 172 F. 2d 16. The court of appeals reversed a district court ruling that a man who left the position of laborer on air-conditioning and electrical equipment of railroad passenger cars was entitled upon his return to be reinstated in the position of apprentice, since the man who had taken his position had been advanced to that position. Although the court felt that the employee was entitled to the return of his job as laborer, he was not entitled to such transfer as his successor achieved. The court followed its earlier decision in *Oil Workers International Union* v. *Sinclair Refining Co.* (C. C. A. 5th, 1948), 171 F. 2d 192, and the decisions of the Sixth Circuit in *Raulins* v. *Memphis Union Station Co., supra,* and *Maloney* v. *Chicago B. & Q. R. Co.* (W. D. Mo., 1947), 72 F. Supp. 124.

Boston & Maine R. Co. v. *David* (C. C. A. 1st, 1948), 167 F. 2d 722. There, a veteran was held entitled to restoration to his old permanent classification as sheet metal worker helper, even though he had been rated as sheet metal worker with a temporary designation when inducted—the employments being distinct.

Trischler v. *Universal Potteries, Inc.* (S. D. Ohio, 1947), 78 F. Supp. 609, aff'd. (6th C. C. A., 1948), 171 F. 2d 707. In this case each employee claimed a higher position which would have been offered to him in order of seniority had he not been away to war. But as in the present case, there was no provision for an employee to claim retroactively

opportunities missed because of leave of absence or furlough, and therefore each employee was denied the right to the other classification.

Each of the following cases is either in flat conflict with the decision below or tends to point to the incorrectness of the court's determination in this respect. One of the cases (*System Fed. No. 30*) is a decision of the National Railway Adjustment Board, the administrative body most skilled in dealing with these railroad matters and involving this same problem of the right of one who had refused opportunities to advance to a different classification prior to military service, but who claimed the right to displace the first man junior to him who was promoted following his induction. However, as none of the cases here cited is at one and the same time both the decision of a court of appeals and also in flat conflict, we cite these cases as indicative of the error below rather than as being of themserves the reason for granting the writ:

System Fed. No. 30, Ry. Emp. Dept. A. F. L. v. *Baltimore & O. R. Co.*, Award No. 1187, Nat. R. Adjustment Bd., 2d Div., Docket No. 1114.

Maloney v. *Chicago, B. & Q. R. Co.* (W. D. Mo., 1947), 72 F. Supp. 124.

Eaton v. *Atchison, T. & S. F. Ry. Co.* (U. S. D. C. Kans., 1948), — F. Supp. —, 14 Lab. Cases ¶ 64463.

Willoughby v. *Atchison, T. & S. F. Ry. Co.* (U. S. D. C. Kans., 1948), — F. Supp. —, 14 Lab. Cases ¶ 64464.

Harrison v. *Seaboard A. L. R. Co.* (E. D. So. Car., 1948), 77 F. Supp. 511.

Nevins v. *Curtiss-Wright Corp.* (C. C. A. 6th, 1949), 172 F. 2d 535.

Of interest also as showing that the rule adopted by the court below is out of line with the decisions heretofore arrived at under the Selective Training and Service Act, are

cases in the tandem-roster situation where the new designation was merely a promotion acquired by the mere lapse of time and in circumstances where there is no question that the veteran would have sought and received it had he not been in the service. In this group can be listed *Spearmon* v. *Thompson, Trustee*, dealt with above, insofar as are involved the men who were actually serving as mechanic when they were inducted and who would have acquired seniority as a mechanic with the mere lapse of time but for their induction. The other two cases are:

Morris v. *Chesapeake & O. R. Co.* (N. D. Ind., 1947), 75 F. Supp. 429, aff'd (C. C. A. 7th, 1948), 171 F. 2d 579, cert. den. 336 U. S. 967, No. 638, O. T. 1948.

Freeman v. *Gateway Baking Co.* (D. C. Ark., 1946), 68 F. Supp. 383.

2. *If petitioner trainmen were wrongfully denied an opportunity of transfer with retroactive seniority to the freight roster, they are entitled to compensatory damages for the employer's wrongful act; and the decision below is in direct conflict with the statute granting jurisdiction and with the uniform practice under the decisions in other circuits.*—If respondents were rightfully accorded transfer to the seniority roster of petitioners, then petitioners were unlawfully deprived of an equal right to transfer to the freight roster. The court below so held. But the court below denied damages because petitioners never demanded [3]

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[3] The statement of the court below that there is nothing to indicate a demand for transfer by petitioners or a refusal by the Railroad simply is contradicted by the record. There was certainly a demand when the amended complaint was filed, and the appellants, at the least, are entitled to damages from that date. The filing of the amended complaint in which was set forth the claim to the alternative relief was certainly a demand. *Kaufman* v. *Tredway*, 195 U. S. 271. If it be urged that the claim for alternative relief was not a demand because it asked for too much, or was conditional on the denial to appellants of their first cause of action, it is sufficient answer that the respondent Railroad did not tender performance and did not keep the tender good. The United States Court of Appeals

a transfer to the freight roster and it would be harsh to permit a serviceman to return to his job, keep silent for an extended period of time though fully aware of the circumstances, and then claim damages for the employer's failure to offer him a right to a different job for which he never applied. This it held despite expressly finding that (R. 71) "There is no showing that appellants' failure to seek the proper relief [i.e., the opportunity of transfer to the freight roster rather than protesting the transfer of respondent trainmen] resulted in any injury to the railroad."

The issue of damages, in the event petitioners were entitled to relief, was not raised by the motions for summary judgment (R. 31, 40), and was neither passed on by the district court, assigned as error in the court of appeals, briefed or argued. No evidence from which it might be inferred that petitioners had slept on their rights was ad-

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for the First Circuit said, *Trusteed Funds* v. *Dacey* (1947), 160 F. 2d 413, 422:

> "• • • We do not think a veteran necessarily loses all his rights under the Act merely because in applying for reemployment he couples such application with a demand for something he erroneously believes to be his due. If the employer then makes him an offer of reemployment which is in full compliance with the employer's obligation under the Act, and the veteran rejects the offer, then certainly this would foreclose any claim for interim damages for so long as the veteran stands on such rejection. Whether the veteran could withdraw such rejection, either within or after the 90-day period, and thus reinstate his employment rights, we do not now undertake to decide. *But if, in the case supposed, the employer does not make the veteran an offer of reemployment which is in full compliance with the employer's obligation under the Act, then the fact of the veteran's having asked for too much is of no legal consequence;* upon a complaint by the veteran under § 8, the court may order his reinstatement to the position to which he is entitled, *and may assess appropriate interim damages.*" (Italics added.)

This holding was reaffirmed and approved in *Boston & M. R. R.* v. *David* (C. C. A. 1st, 1948), 167 F. 2d 722, 725. And this accords with the law established in other cases by this Court. *Spalding* v. *Mason*, 161 U. S. 375, 396; *Storm* v. *Boker*, 150 U. S. 312, 341; and *Colby* v. *Reed*, 99 U. S. 560.

duced. To the contrary, the complaint (R. 9) and amended complaint (R. 20) specifically alleged that application for reemployment was duly made. The Act requires no other or further demand; when only that demand is made the Act, § 8(b)(B) provides the employer *shall* restore the veteran to "such position", and, § 8(c), that on such restoration the employee *shall* be considered as having been on leave or furlough, etc.[4] Beyond this, the complaint shows that petitioners had been completely without notice of any rights of retroactive transfer which respondent Railroad had privately agreed with the respondent Brotherhood might be accorded to the more numerous freight veterans only. The affidavit of one of the named petitioners (Petenbrink, R. 52) shows the prompt and repeated protests which he had made respecting the seniority accorded to freight veterans; the affidavits of the secretary and treasurer and both the past and present president of the local lodge of the Brotherhood, of which petitioners were members, were adduced to prove that information respecting the arrangement had been suppressed. R. 47-52. Also material is the fact that the Railroad and the Brotherhood throughout have opposed the right of petitioners to the transfer to which they were finally held entitled by the court below. It follows that a demand would have been futile; and therefore a demand,

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[4] The statutory language is the familiar language of command. *Railroad Co.* v. *Hecht*, 295 U. S. 168, 170; *Work* v. *Lynn*, 266 U. S. 161, 168-169; *United States ex rel. Siegel* v. *Thoman*, 156 U. S. 353, 359-360. As said in *Ex parte Jordan*, 94 U. S. 248, 251: "The language of the statute is 'shall be allowed', which means 'must be allowed' when asked for by one who stands in such relation to the cause that he can demand it." And as said by Mr. Justice Douglas in *Anderson* v. *Yungkan*, 329 U. S. 482, 485:

> "The word 'shall' is ordinarily 'the language of command'. *Escoe* v. *Zerbst*, 295 U. S. 490, 493. And when the same rule uses both 'may' and 'shall', the normal inference is that each is used in the usual sense —the one being permissive, the other mandatory. See *United States* v. *Thoman*, 156 U. S. 353, 360."

as a matter of law, is not a prerequisite to relief, as it is obvious that it would be futile because it would certainly be refused. This is an old principle of law, for which lengthy citation of authorities should be unnecessary. See 26 Am. & Eng. Encyc. of Law, p. 44.

A. The Selective Training and Service Act, § 8(e), vests jurisdiction in "the *district* court of the United States for the district in which such private employer maintains a place of business" with power "to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action." The decision of the court below, whereby it seized this jurisdiction for itself without regard to how the discretion of the district court may have been exercised after trial of the issue, not only conflicts with the express language of the statute, but conflicts with a uniform interpretation of this language whereby the various other circuit courts of appeal have remanded such questions for exercise of the discretion by the district court.

Thus, in *John S. Doane Co.* v. *Martin* (C. C. A. 1st, 1947), 164 F. 2d 537, 541:

> "• • • The Act provides that the district court shall have power to compensate him for any loss of wages resulting from an employer's unlawful refusal to reinstate him to his former position. As was said in Bentubo *v.* Boston and Maine Railroad, 1 Cir., 160 F. 2d 326, the district courts have discretionary power to reduce the damages under the Act. . . . In the matter of the mitigation of damages, the burden is upon the respondent to produce evidence showing the amount of money the petitioner did earn, or with reasonable care and diligence could have earned, and since there is to be a new trial evidence to this effect should be present. . . ."

And in *Special Service Co., Inc.* v. *Delaney* (C. C. A. 5th, 1949), 172 F. 2d 16, 20, where the employee was held to be entitled to damages from the period between his first application and the date of the employer's first offer to reinstate him, the court said "Further proceedings in this regard are within the discretion of the district court. We shall, therefore, remand the cause to that court with the single limitation that recovery be limited to the above-specified period." So in *Schreier* v. *M. H. Fishman Co.,* (C. C. A. 3d, 1948), 176 F. 2d 722, the court held that the veteran was not shown to have waived his rights or to have estopped himself from enforcing his rights under the act and remanded the case with instructions to the district court to resolve questions respecting application for reemployment and determination of the amount which the employee would have received had the employer complied with the act. In *Allyn* v. *Abad* (C. C. A. 3d, 1948), 167 F. 2d 901, 904, a situation was met which was exactly similar to that below: In both cases the district court had incorrectly held that the veteran was not entitled to any of the reemployment rights which he asserted, and its decision was reversed. But the court in that case held:

> "From the foregoing, it becomes clear that petitioner is entitled to restoration. Whether compensation is likewise due him, under the principles enunciated in Van Doren *v.* Van Doren Laundry Service, supra, is a question upon which the court below was not required to pass, because of its conclusion that under the circumstances it was not incumbent upon respondent to restore petitioner. Our ruling to the contrary makes it appropriate that *the cause be remanded to the court below for determination of the compensation question which still remains.*" (Italics added.)

Typical also is *Levine* v. *Berman* (C. C. A. 7th, 1947), 161 F. 2d 386, cert. den. 332 U. S. 792, No. 307, O. T. 1947, in which the court held that the district court must determine

the right of the veteran to damages. Thereupon, the district court did consider the matter and concluded that the veteran had been guilty of fraud and bad faith and had estopped himself from obtaining damages. The court of appeals affirmed that determination in *Levine* v. *Berman,* 178 F. 2d — (decided December 19, 1949).

B. Denial of compensation without a hearing in this case was an abuse of discretion, even if the circuit court of appeals had the power to exercise a discretion in the circumstances. Unless petitioners are not shown by this record to have been guilty of conduct estopping them from enforcing their rights, they are entitled under the act to such damages as they may be able to show. It has been flatly held in the Third Circuit that, although the district court did have a discretion to grant or withhold compensatory damages, that discretion is abused in the absence of a showing of a waiver or wrongful conduct on the part of the veteran. The court said in *Van Doren* v. *Van Doren Laundry Service* (C. C. A. 3d, 1947), 162 F. 2d 1007, 1011, 1012:

> "• • • We find it unnecessary to pass upon the issue at this time; for, under the view we take of the case sub judice, even if the granting of compensation be deemed discretionary, we believe that denial in the instant case was improper.
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> • • • • • • •
>
> "Having determined that a money judgment should also have been granted petitioner, we must reverse the judgment and remand for computation of the sum due him. As we have indicated above, petitioner's right to reinstatement matured when he received his honorable discharge on December 27, 1944. See Tipper v. Northern Pac. Ry. Co., D. C., 1945, 62 F. Supp. 853. This raises the question whether the delay in filing suit defeats petitioner's right. If the delay is not attributable to petitioner, it follows that petitioner was entitled not only to reinstatement, but also to compensation

with interest thereon for the period of December 27, 1944 to December 27, 1945. See Dodds v. Williams, D. C. 1946, 68 F. Supp. 995, 997."

As we have shown above, not only is the record without any showing that petitioners delayed unreasonably demanding their rights, but respondent employer itself was in a great measure responsible for such delay in seeking the specific relief accorded below as has occurred. In such circumstances, the Fifth Circuit has rejected the rule which was adopted by the court below. There, the court said in *Watkins Motor Lines, Inc.* v. *De Galliford* (C. C. A. 5th, 1948), 167 F. 2d 274, 275:

> "As to the third question above mentioned, we agree with the court below that the veteran made every reasonable effort to secure re-employment amicably before filing suit, and should not be charged with undue delay in filing this action. The appellant itself was responsible for much of the delay."

We do not urge that damages are due to petitioners as a penalty upon respondent Railroad. What we are asking is the opportunity to prove our damages and to be compensated for the actual losses which petitioners have suffered.

Conclusion

The writ should be granted.

Respectfully submitted,

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INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	3
ARGUMENT	8
1. The ruling of the Court of Appeals with respect to respondent trainmen's standing on the passenger roster presents no question of general importance, is not in conflict with decisions in other circuits, and is correct	8
2. The decision below that petitioners are not entitled to damages for asserted failure to accord them the opportunity to transfer back to the freight roster with antedated freight seniority presents no matter of substance, does not conflict with decisions in other circuits, and is obviously correct	11
CONCLUSION	15

CITATIONS

Cases:

Boston & Maine R. Co. v. David, 167 F. 2d 722 (C. C. A. 1)	10
Fishgold v. Sullivan Corp., 328 U. S. 275	9
Hewitt v. System Federation No. 152, etc., 161 F. 2d 545 (C. C. A. 7)	10
Morris v. Chesapeake & Ohio Ry. Co., 171 F. 2d 579 (C. C. A. 7), cert. denied 336 U. S. 967	11
Oakley v. Louisvtlle & N. R. Co., 338 U. S. 278	9
Raulins v. Memphis Union Station Co., 168 F. 2d 446 (C. C. A. 6)	10

PAGE

Spearmon v. Thompson, 167 F. 2d 626 (C. C. A. 8), cert. denied 335 U. S. 822 and 335 U. S. 886 10
Special Service Co., Inc. v. Delaney, 172 F. 2d 16 (C. C. A. 5) 10
Trischler v. Universal Potteries, Inc., 78 F. Supp. 609 (S. D. Ohio), affirmed 171 F. 2d 707 (C. C. A. 6) 10

Statutes:

Selective Training and Service Act of 1940 (54 Stat. 885, as amended, 50 U. S. C. App. 301 et seq.) 2, 3, 5, 7, 8, 12, 14
Sec. 8(b) 3, 9
Sec. 8(c) 3, 9
United States Code, Title 28, Sec. 1254(1) 2

Supreme Court of the United States

October Term, 1949

No. 575

R. E. CONNER, KENNETH L. KNITTER, and VINCENT L. PETENBRINK, Suing on Behalf of Themselves and All Others Similarly Situated, *Petitioners,*

vs.

THE PENNSYLVANIA RAILROAD COMPANY, BROTHERHOOD OF RAILROAD TRAINMEN, H. F. SITES, A. F. WHITNEY, E. W. WILSON, CHARLES F. PUSEY, J. H. ALLERS, JOSEPH M. DECKER, C. A. LEATHERS, JR., E. R. BRISCOE, J. E. BERBIG, F. J. MEADOWCROFT, C. H. GITTINGS, W. F. HARRISON, NATHAN BERKMAN, J. M. PARKER, EARL R. DEANER, B. J. SHANKWEILER, I. E. WAGNER, H. F. HANNY, W. A. SCOTT, H. W. HIGHFIELD, R. E. SATTERFIELD, SANFORD R. HALLIDAY, L. C. LECOMPTE, E. D. SAXTON, and CLIFTON K. AREHART.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS OTHER THAN THE PENNSYLVANIA RAILROAD COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 65-72) is reported in 177 F. 2d 854. The opinion of the district court (R. 60-62) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 1949 (R. 73). Petitioners' application for rehearing was denied on October 5, 1949 (R. 85). On December 29, 1949, Chief Justice Vinson extended petitioners' time for applying for certiorari to February 2, 1950 (R. 90). The petition for writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

(1) Whether the Court of Appeals correctly held that under the collective bargaining agreement and established custom and practice the respondent trainmen had a right to transfer from freight to passenger service on the basis of seniority, and therefore they were entitled under the Selective Training and Service Act of 1940 upon their return from military service to transfer to the passenger roster with seniority on that roster from the dates on which they would have been transferred but for their absence on military duty.

(2) Whether the Court of Appeals correctly held that petitioners are not entitled to damages for asserted failure to permit them to transfer back from passenger to freight service with seniority on the freight roster ahead of those who entered freight service after petitioners joined the armed forces, where petitioners have at no time to date requested such transfer and even now in their amended complaint ask only that they be "tendered" the "opportunity" so to elect in the event they lose in their attack on respondent trainmen's standing on the passenger roster.

STATUTE INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940 (50 U. S. C. App. 308; 54 Stat. 885, § 8, as amended) are set out in the petition for certiorari, and will not be repeated here.

STATEMENT

This is a class action by petitioners for declaratory judgment, injunction, accounting and money damages for alleged nonconformance with the reemployment provisions of §§ 8(b) and 8(c) of the Selective Training and Service Act of 1940. The named petitioners are three trainmen employed on the Maryland Division of The Pennsylvania Railroad Company (R. 11-12). Respondents are The Pennsylvania Railroad Company (R. 12-13); Brotherhood of Railroad Trainmen—the collective bargaining agent of the trainmen employed by the Railroad—its President and its General Chairman (R. 13); and twenty-three trainmen employed by the Railroad on its Maryland Division (R. 14).

The district court granted motions for summary judgment filed by the Railroad and by the respondents other than the Railroad (R. 62-63). The Court of Appeals affirmed in part and reversed in part (R. 73). The undisputed facts as shown by the complaint and the affidavits on the motions for summary judgment may be summarized as follows:

The Railroad maintains separate seniority rosters for freight and passenger service on its Maryland Division (R. 17). Rule 1-D-3 of the collective bargaining agreement between the Brotherhood and the Railroad provides for transfer from one roster to another as follows (R. 15):

1-D-3 (a) On a seniority district where, on the effective date of this Agreement, it is the practice to employ trainmen for passenger, or freight or yard service exclusively, when additional passenger trainmen are needed the applications of freight and yard trainmen on the said seniority district shall be given consideration, after which the applications of switchtenders on that seniority district shall be considered.

(b) When additional freight and yard trainmen are required on a seniority district where the practice referred to in paragraph (a) is in effect, the applications of passenger trainmen shall be given consideration, after which the applications of switchtenders on that seniority district shall be considered.

(c) Notice shall be published on bulletin boards giving the said trainmen and switchtenders reasonable time within which to file their applications.

Rule 3-F-1 provides that one who accepts "permanent transfer" from one roster to another "shall retain the seniority he earned in the group from which transferred and shall acquire seniority in the group to which transferred from the date of transfer" (R. 16).

The affidavits filed in support of the motions for summary judgment show unequivocally that it has always been the custom and practice of the Railroad, when additional passenger trainmen are needed on the Maryland division, to transfer to passenger service the trainmen in freight service who possess the greatest seniority and who make application for the transfer (R. 42, 45, 46). Petitioners' affidavits say nothing in contradiction, and this fact may therefore be accepted as undisputed.

Both the respondent trainmen and the petitioners are trainmen employed on the Maryland Division of the Railroad, are veterans of the recent war, and were originally employed by the Railroad as freight trainmen (R. 11-12, 14, 18-19). Petitioners transferred from freight to passenger service before their entry upon military duty (R. 11-12). The respondent trainmen, however, who entered

the armed forces before petitioners, were still on the freight roster when they left for military duty.

One of respondents, I. E. Wagner, entered military service on February 12, 1941 and was released the same year (R. 25). During his absence a number of freight trainmen junior to him were transferred to the passenger roster under Rule 1-D-3 (id). Immediately upon his return Wagner applied for similar transfer (id). The question of his seniority on the passenger roster arose. There resulted an exchange of correspondence between the Brotherhood and the Railroad culminating on February 5, 1942 in an agreement on the question (R. 25-30). The agreement provided that, in view of Regulation 1-D-1 (now Rule 1-D-3) and the established custom and practice of transferring trainmen from freight to passenger service on the basis of freight seniority, a freight trainman who would have had the opportunity to apply for transfer to passenger service but for his absence on military duty and who applied for such transfer within ten days after his return, should under the Selective Training and Service Act of 1940 "be given standing on the passenger brakemen's roster ahead of the immediate junior freight or yard man accepted for passenger service during his occupation in military or naval service" (R. 30). That policy was consistently followed thereafter.

All of the other respondent trainmen applied for transfer to the passenger roster within ten days after their return from military service. It is undisputed that each of them, had he been present and applied, would have been transferred to passenger service ahead of his immediate junior on the freight roster who transferred during his absence (R. 44). Accordingly, each was given standing on the passenger roster immediately ahead of that junior (R. 19). Petitioners, who had transferred from freight to passenger service before leaving for military duty, upon their return were restored to passenger

service with the seniority on that roster which had accumulated during their absence (R. 11-12).

The net effect of this practice was to give respondent trainmen and petitioners the same relative seniority positions on the passenger roster they had formerly enjoyed on the freight roster, except of course where men had failed to exercise the opportunity to apply even though present and able to so do. A respondent trainman who was senior to a petitioner on the freight roster, but who entered military service earlier and therefore was unable to elect to transfer before the petitioner did, was permitted upon his return from military service to transfer to the passenger roster with seniority ahead of that petitioner (R. 55-58).

In their amended complaint petitioners alleged alternative causes of action with corresponding prayers for alternative relief. First, they alleged that respondent trainmen were given wrongful seniority on the passenger roster. Thus they asserted that respondent trainmen should not have been permitted to transfer at all or should have been given seniority only from the dates on which they actually transferred after their return, and not from the dates on which they would have been transferred but for their absence (R. 18-20).

As an alternative cause of action, urged only in the event they fail on their first cause, petitioners asserted that under Rule 1-D-3(b) of the collective bargaining agreement each of them should now be "tendered" the "opportunity" of transferring back from passenger to freight service with seniority immediately ahead of the first employee who joined freight service after that petitioner left for military duty, together with a tender of damages for failure to accord them the opportunity so to transfer upon their return from the armed forces (R. 22-24). Petitioners have never at any time since their return requested such retransfer to freight service, and did not even make such a suggestion in their original complaint (R. 9-10).

The first reference to this matter came in their amended complaint filed December 17, 1947, well over a year after the last of them had returned to private employment and been reinstated on the passenger roster with service-accumulated seniority. Even there they do not request retransfer, but ask only the "opportunity" to elect to do so if they lose in their attack on respondent trainmen's positions on the passenger roster (R. 22-24). Moreover, as both the district court and the Court of Appeals pointed out (R. 62, 71), there was never any custom or practice of transferring from passenger to freight service on the basis of passenger seniority.

The district court granted respondents' motions for summary judgment as to both causes of action. It held that, since it was the established custom under the contract to permit transfer from freight to passenger service on the basis of freight seniority, respondent trainmen were entitled to transfer with accumulated passenger seniority under the Selective Training and Service Act of 1940. It ruled that petitioners had no right to transfer back from passenger to freight service with accumulated freight seniority, since there had never been any custom of such transfer from passenger to freight service and it is clear that petitioners would not have elected so to transfer had they been present when the freight vacancies arose (R. 62).

The Court of Appeals likewise held that respondent trainmen are entitled to their standing on the passenger roster, because under the contract "the established practice was to transfer to passenger service qualified trainmen in freight service who made application for such transfer and who possessed the highest seniority in freight service" (R. 69) and because "to allow these men to transfer but to place them at the bottom of the list would be to penalize them by reason of their being in the service" (R. 70). With respect to the alternative cause of action, the Court of Appeals held that petitioners are not entitled to

damages for the alleged failure to accord them the opportunity to retransfer to freight service, because they had never requested such retransfer. It concluded, however, that petitioners should now be tendered that opportunity, even though no request for such retransfer had ever been made and even though there was never any custom or practice of transferring from passenger to freight service on the basis of seniority, as there is in the case of transfer from freight to passenger service (R. 71-72).

Petitioners seek review of all rulings of the Court of Appeals adverse to them. This brief in opposition is filed on behalf of the respondents other than the Railroad. Both these respondents and the respondent Railroad have filed conditional cross-petitions (Nos. 645 and 646, this Term) asking review of that part of the Court of Appeals decision adverse to them in the event, but only in the event, that this Court should grant petitioners' application here.

ARGUMENT

1. The ruling of the Court of Appeals with respect to respondent trainmen's standing on the passenger roster presents no question of general importance, is not in conflict with decisions in other circuits, and is correct. This ruling does not involve any question of construction of the Selective Training and Service Act of 1940, but rests entirely upon the contract provisions and the established custom and practice concerning transfer from one roster to another.[1]

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[1] It is to be noted that, while petitioners seek to base their first cause of action on the provisions of the Selective Training and Service Act of 1940, they do not complain of noncompliance with the Act by reason of failure to accord them service-accumulated seniority. They were restored to the passenger roster with full seniority accruing during their absence. Petitioners' complaint is that respondent trainmen, who are also veterans and who entered military service before petitioners, received greater seniority than

Sections 8(b) and 8(c) of the Act provide that a person leaving a private position for military service shall upon his return be restored to the same or a like position without loss of seniority, and with all benefits granted under established rules and practices relating to furlough or leave of absence. This Court has established that under the statute a veteran is "not to be penalized" or "lose ground" by reason of his absence, and that the purpose of the Act is "to preserve the veteran's rights under" seniority systems. *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 284-288; *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, 283. The decision below correctly follows those principles as they apply to the particular facts of this case.

The collective bargaining agreement between the Brotherhood and the Railroad expressly provides for transfer from freight to passenger service (R. 15).[2] It is undisputed in the record (R. 42, 45, 46), and both the district court and the Court of Appeals expressly concluded (R. 60-62, 69), that it was the established custom and practice to transfer from freight to passenger service on the basis of freight seniority. Both courts below decided that, in view of the contract and the established custom and practice, the right to transfer from freight to passenger service is a valuable seniority right which must be made effective as of the date the right arose, if respondents are not to be penalized or lose ground by virtue of their absence on

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they are entitled to, and that petitioners' positions on the passenger roster were thereby affected. In this regard petitioners' status as veterans is irrelevant, since they are affected no more than non-servicemen who transferred to the passenger roster during the absence of respondent trainmen.

[2] Moreover, contrary to petitioners' assertion (Pet. 9), Rule 2-A-3(b) of the collective bargaining agreement expressly states that a trainman on furlough or leave of absence for 30 days or more "upon his return to duty may exercise his seniority on any assignment or pool" whether or not filled during his absence. This rule appears in Exhibit A to the amended complaint, which is on file with the Clerk although not included in the printed record.

military duty. Of course if the right of transfer is a seniority right it is protected by the statute. The only question there could be, therefore, is whether the Court of Appeals correctly held this to be a seniority right. That question turns solely on the contract and the established custom and practice and thus is not of such general importance as to warrant certiorari.

The ruling of the Court of Appeals in no way conflicts with decisions in other circuits. Petitioners suggest inconsistency with a number of cases. *Hewitt* v. *System Federation No. 152,* etc., 161 F. 2d 545 (C. C. A. 7, 1947); *Raulins* v. *Memphis Union Station Co.,* 168 F. 2d 466 (C. C. A. 6, 1948); *Spearmon* v. *Thompson,* 167 F. 2d 626 (C. C. A. 8, 1948), certiorari denied, 335 U. S. 822 (sub. nom. *Thompson, Trustee* v. *Spearmon*), and 335 U. S. 886 (sub nom. *Delozier* v. *Thompson, Trustee*), opinion on rehearing, 173 F. 2d 452; *Special Service Co., Inc.* v. *Delaney,* 172 F. 2d 16 (C. C. A. 5, 1949); *Boston & Maine R. Co.* v. *David,* 167 F. 2d 722 (C. C. A. 1, 1948); *Trischler* v. *Universal Potteries Inc.,* 78 F. Supp. 609 (S. D. Ohio, 1947), affirmed 171 F. 2d 707 (C. C. A. 6, 1948). All of those cases are plainly distinguishable. In the *Hewitt, Raulins, Spearmon,* and *Delaney* cases, there was no contract or established custom providing for transfer from one roster to another on the basis of seniority. In the *Trischler* case, not only was there no such contract or custom but actual experience on the job was an important requirement for transfer. The *David* case did not involve the issue of right to transfer with accumulated seniority or any other question pertinent here, but dealt only with whether the employer was required to give a veteran employment when no work was available.

Moreover, the decision below is clearly correct. It is undisputed that during and except for the absence of respondent trainmen on military duty they would have been offered the opportunity to transfer to passenger serv-

ice on the basis of their freight seniority, and they would have been so transferred had they been present and applied (R. 44). They would then of course have accumulated seniority on the passenger roster from that date forward. To put them at the bottom of the passenger roster upon their return from military service, as petitioners suggest, would mean that all those trainmen who transferred to passenger service on the basis of freight seniority during the respondent trainmen's absence would now be above those respondents on the passenger roster. This includes petitioners since they made the election to transfer before they went into military service but after respondent trainmen had entered upon military duty. Obviously if respondent trainmen's right to transfer on the basis of freight seniority is to be protected, it must be made effective as of the date the right arose.

The decision below is squarely in line with that in *Morris* v. *Chesapeake & Ohio Ry. Co.*, 171 F. 2d 579 (C. C. A. 7, 1948). There as here the court held that, since under the collective bargaining agreement and established custom an employee was entitled to elect to transfer from one roster to another on the basis of seniority, a returning veteran who made that election should be given seniority on his new roster from the date he would have been transferred but for his absence. This Court denied certiorari in that case on May 2, 1949 (336 U. S. 967), although all of the decisions which petitioners rely upon here to show conflict were then in existence and the petitioners there similarly asserted a conflict among circuits. *A fortiori,* the petition should be denied here.

2. **The decision below that petitioners are not entitled to damages for asserted failure to accord them the opportunity to transfer back to the freight roster with antedated freight seniority presents no matter of substance, does not conflict with decisions in other circuits, and is obviously correct.** It is clear that this ruling does not involve any

question of interpretation of the Selective Training and Service Act of 1940, or any other issue of general importance. The decision on this question rests solely on the particular facts of this case.

Moreover, the ruling is manifestly correct. The Court of Appeals held that petitioners are not entitled to damages because "there is no indication that any of [them] requested a transfer under any circumstances" (R. 72). The Court concluded that: "It would be a harsh rule that would permit a serviceman to return to his job, keep silent for an extended period of time, even though he was fully aware of all the circumstances, and then claim damages from his employer for failure to offer him a right to a different job for which he never applied" (id.). This conclusion is so obviously correct that it requires no elaboration from us.

Petitioners seek to avoid this dilemma by making several wholly unfounded assertions. Thus they say that at least their amended complaint constituted a demand for transfer and they are entitled to damages from the date it was filed (Pet. 19, fn. 3). But even in the amended complaint—which was filed well over a year after the last of petitioners had returned from military service and been reinstated on the passenger roster with accumulated seniority—they do not demand retransfer. On the contrary, they ask only that they be "tendered" that "opportunity", and then only if they are unsuccessful in their attack on respondent trainmen's standing on the passenger roster (R. 22-24). Obviously petitioners cannot seek to improve their positions on the passenger roster by defeating respondent trainmen's standing thereon, and at the same time assert that they are entitled to damages for not being on the other roster during the period they are pursuing that effort if it should turn out to be unsuccessful.

Petitioners suggest that they had no notice of any rights they may have to retransfer to the freight roster (Pet. 21). But of course the collective bargaining agreement fully states whatever rights they may have to make such an election, if indeed there be any, and petitioners are charged with knowledge of those contract provisions. Petitioners say it would have been futile to demand transfer because both the Brotherhood and the Railroad now oppose it (Pet. 21-22). That is no answer to the fact that petitioners never suggested such transfer prior to their amended complaint, and even there make only a conditional request for the opportunity to elect so to transfer.

Petitioners assert that the issue of damages, in the event they are entitled to transfer, was not raised by the motions for summary judgment and was not briefed or argued in the Court of Appeals (Pet. 20). The motions for summary judgment attacked petitioners' right to transfer as well as their right to damages, and the district court granted the motions in full. Respondents similarly contested both points in the Court of Appeals, and that Court affirmed in part and reversed in part. The Court of course considered both points, as it pointed out in its *per curiam* opinion denying petitioners' application for rehearing (R. 84). And the fact that the Court held that petitioners should be given the opportunity to elect to transfer now does not mean that it was not entitled to hold that petitioners are nevertheless not entitled to damages. Apparently in an effort to make the same argument in another way, petitioners assert that the Court of Appeals should not have denied damages without a hearing (Pet. 24-25). But the Court clearly was entitled to rule that as a matter of law petitioners can recover no damages whatsoever because they have never at any time requested the opportunity to transfer back to freight service.

Petitioners say that under the Selective Training and Service Act of 1940 only the district court has authority to assess damages in the first instance. It does not follow, however, that the Court of Appeals has no power to rule that petitioners are entitled to *no* damages. Particularly is this true where, as here, the district court had already reached the same conclusion. Petitioners cite several cases which they say are in conflict with the Court of Appeals ruling on damages (Pet. 22-24). At most those cases merely indicate that where the veteran is entitled to *some* damages the amount should be determined initially by the district court. They have no bearing on the power of the Court of Appeals to hold as a matter of law that the veteran is entitled to no damages because he has never applied for transfer.

Petitioners in several places characterize the decision of the Court of Appeals as holding that they have been "wrongfully denied" an opportunity to transfer to the freight roster (Pet. 3, 12, 19). To the contrary, the Court below held only that under the collective bargaining agreement petitioners should now be given the opportunity to elect to transfer to freight service, and expressly concluded that petitioners have never demanded and therefore have never been denied such transfer. In our pending conditional cross-petition for certiorari in No. 646, this Term, we set out a number of reasons why petitioners are not even entitled to the right to transfer back to freight service with antedated seniority, a question which stands on a very different footing from that of the right of respondent trainmen to transfer to passenger service with antedated passenger seniority. Of course if petitioners have no right to transfer at all they obviously are entitled to no damages. However, we reiterate our position stated in the conditional cross-petition that in our view there is no question in the case which warrants certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

March 1950.

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Counsel for Respondents other than The Pennsylvania Railroad Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 575.

R. E. CONNER, KENNETH L. KNITTER, and VINCENT L. PETENBRINK, Suing on Behalf of Themselves and all Others Similarly Situated, *Petitioners*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, BROTHERHOOD OF RAILROAD TRAINMEN, H. F. SITES, A. F. WHITNEY, E. W. WILSON, CHARLES F. PUSEY, J. H. ALLERS, JOSEPH M. DECKER, C. A. LEATHERS, JR., E. R. BRISCOE, J. E. BERBIG, F. J. MEADOWCROFT, C. H. GITTINGS, W. F. HARRISON, NATHAN BERKMAN, J. M. PARKER, EARL R. DEANER, B. J. SHANKWEILER, I. E. WAGNER, H. F. HANNY, W. A. SCOTT, H. W. HIGHFIELD, R. E. SATTERFIELD, SANFORD R. HALLIDAY, L. C. LECOMPTE, E. D. SAXTON, and CLIFTON K. AREHART, *Respondents*.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
First Cause of Action	3
Second Cause of Action	4
Statutes Involved	9
Argument	9
Conclusion	16
Supplement: Relevant Statutory Provisions	17

CASES CITED.

Aeronautical Lodge v. *Campbell*, 337 U. S. 521 9

Boston & Maine R. Co. v. *David*, 167 F. (2d) 722 (C. C. A. 1st, 1948) 11

Chesapeake & Ohio Railroad Co. v. *Morris*, 336 U. S. 967, opinions below, 171 F. (2d) 579 (C. C. A. 7th, 1949) and 75 F. Supp. 429 (N. D. Ind. 1947) 12, 13

Delozier v. *Thompson, Trustee*, 335 U. S. 886 13

Dougherty v. *General Motors Co.*, No. 518, Oct. Term 1949, 18 U. S. L. Week 3233 (U. S. Feb. 13, 1949) 12, 13

Fishgold v. *Sullivan Drydock & Repair Corporation*, 328 U. S. 275 9

Hewitt v. *System Federation No. 152 Ry. Employees' Dept. A. F. L.*, 161 F. (2d) 545 (C. C. A. 7th, 1947) 11

Oakley v. *Louisville & N. Railroad Co.*, 338 U. S. 278 .. 9

Raulins v. *Memphis Union Station Co.*, 168 F. (2d) 466 (C. C. A. 6th, 1948) 11

Spearmon v. *Thompson, Trustee Mo. Pac. Ry. Co.*, 167 F. (2d) 626 (C. C. A. 8th, 1948), cert. den. 335 U. S. 822 and 335 U. S. 886, opinion on rehearing 173 F. (2d) 452 12

Special Service Co. v. *Delaney*, 172 F. (2d) 16 (C. C. A. 5th, 1949) 11

Page

Thompson, Trustee v. *Spearmon*, 335 U. S. 822.....12, 13
Trischler v. *Universal Potteries, Inc.*, 78 F. Supp. 609 (S. D. Ohio, 1947), aff'd. 171 F. (2d) 707 (C. C. A. 6th, 1948) 11

STATUTES CITED.

Judicial Code, Section 1254 2
Selective Training and Service Act of 1940 (50 U. S. C. Appendix § 308; c. 720, 54 Stat. 885, 891, § 8, as amended) 2, 3, 5, 7, 9, 10, 13, 17-19

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R. E. CONNER, KENNETH L. KNITTER, and VINCENT L. PETENBRINK, Suing on Behalf of Themselves and all Others Similarly Situated, *Petitioners,*

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 65-72) is reported in

177 F. (2d) 864. The opinion of the District Court (R. 60-62) is unreported.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code.

Questions Presented.

1. Whether the Circuit Court of Appeals for the District of Columbia Circuit correctly held that the Selective Training and Service Act required the respondent railroad to extend to each respondent freight trainman upon his return from service with the armed forces of the United States the privilege of applying for transfer from the freight service to the passenger service as of the date when he would have had that privilege had he not been away in military service, with corresponding seniority status on the passenger trainmen's seniority roster.

2. Whether the Circuit Court of Appeals for the District of Columbia correctly held that the petitioners, as passenger trainmen, were not entitled to recover damages from the respondent railroad for failing to permit them to transfer from passenger service to freight service as of the various dates when they could have so transferred had they not been away in military service, where it does not appear that any petitioner has ever applied for such transfer at any time after returning from military service.

Statement.

Petitioners' Amended Complaint (R. 10) sets forth two alternative causes of action. The first cause of action involved petitioners' status on the *passenger* trainmen's seniority roster on the Maryland Division of respondent, The Pennsylvania Railroad Company. The second cause of action involved petitioners' status with respect to the *freight* trainmen's seniority roster on the Maryland Divi-

sion. Petitioners assert their second cause of action only in the event that the first cause of action should be decided in favor of the respondents. The facts with respect to the two causes of action are separately considered below. In the District Court, Chief Justice Laws held against petitioners on both causes of action. The Court of Appeals held against petitioners on the first cause of action and also held that petitioners were not entitled to damages on their second cause of action, although the Court of Appeals granted to the petitioners certain other relief requested in their second cause of action.

First Cause of Action

The first cause of action represents, in essence, a conflict between two groups of individuals as to their relative seniority as passenger trainmen. Both groups are veterans, claiming benefits under the reemployment provisions of Section 8 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, 891 (U. S. C., Title 50, Appendix, § 308). Petitioners, representing one group, contend that their seniority rights as passenger trainmen were unlawfully diluted by reason of the fact that members of the second group were placed ahead of them on the passenger trainmen's seniority roster. (R. 18, 19, 20, 21) Petitioners therefore seek a declaratory judgment, an injunction, an accounting and other relief against the twenty-three individual trainmen in the second group as well as against the Brotherhood which represents both groups of trainmen, the President and General Chairman of that Brotherhood and the railroad. (R. 14, 23, 24)

As alleged in the Amended Complaint, there are more than seventy-eight veterans who are in the same situation as petitioners (R. 12); hence there are many possible permutations and combinations of seniority relationships between these persons and the individual respondent trainmen. In the interest of simplification and clarification the circumstances common to all these relationships may be summarized as follows:

(1) Under the applicable collective bargaining agreement and the custom and practice in effect on the Maryland Division, whenever additional passenger trainmen were needed men on the freight trainmen's seniority roster were given the first opportunity, in order of their seniority, to transfer to the passenger service, and, therefore, to the passenger trainmen's seniority roster. (R. 15, 42, 45, 46)

(2) Each of the respondent trainmen was serving as a freight trainman, with standing on the freight trainmen's seniority roster, when he was inducted into the armed services. (R. 55-59)

(3) During the time when each respondent trainman was in military service, a vacancy or vacancies occurred in the passenger service which the said respondent trainman would have been entitled to fill because of his freight trainman's seniority if he had not been away with the armed forces. (R. 44)

(4) The vacancy or vacancies in the passenger service were filled by one or more freight trainmen who were junior to the said respondent trainman in freight service. (R. 19, 55-59) Petitioners transferred to the passenger service while the said respondent trainmen were in military service; the petitioners thus transferring either had been junior on the freight trainmen's seniority roster to the said respondent trainmen or had permitted other freight trainmen junior both to the petitioners and to the respondent trainmen to transfer ahead of them. (R. 19)

(5) At some time after entering passenger service, each of the petitioners was inducted into the armed forces. (R. 11, 12) Upon return from military service, each of them was reemployed in passenger service with seniority dating as of the date of his original transfer to passenger service, or in other words,

with his time with the armed forces being counted for seniority purposes as though he had been continually on the job. (R. 55-59)

(6) When each of the respondent trainmen returned from military service, he was given the opportunity to transfer from freight to passenger service which he would have had if he had not been away with the armed forces. Having elected promptly upon his return so to transfer he was placed on the passenger trainmen's seniority roster immediately ahead of the junior freight trainman who had first transferred to passenger service while he was away. (R. 19)[1]

(7) The result of the above practice is that each of the petitioners now finds ahead of him on the passenger trainmen's seniority roster at least one respondent trainman who was not ahead of him on that roster when the said petitioner left for military service. By their first cause of action, petitioners seek for this reason to have the respondent trainmen removed from the passenger roster altogether or at least placed at the foot of the roster. (R. 23)

(8) The Court of Appeals held in favor of the respondent trainmen on the ground that, in order to avoid being penalized by reason of their absence in military service, they were entitled under the Selective Training and Service Act of 1940, to the opportunity to elect to transfer from freight to passenger service which they would have had if they had not been away.

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[1] Upon his transfer each respondent trainman was thus accorded seniority in passenger service as of the date when he first could have transferred had he not been away in military service, retaining seniority in freight service only up to that date. (R. 30) His position, on both seniority rosters after the transfer, was exactly what it would have been, under section 3-F-1 of the collective bargaining agreement (R. 16), if he had not been away and had elected to transfer from freight service to passenger service when the opportunity first arose.

(R. 69-70) The decision of the District Court was based on similar grounds. (R. 60-61)

The above arrangements for protecting the seniority rights of the respondent trainmen as veterans were provided for and regularized by express written agreement entered into in February, 1942, between respondent railroad and respondent Brotherhood, acting on behalf of all trainmen (including both petitioners and respondents). (R. 29-30) At varying times during the years 1944, 1945, 1946 and 1947, the various respondent trainmen returned from military service, promptly elected to transfer from freight to passenger service and were so transferred in accordance with the terms of this agreement. (R. 18-19, 55-59) Both the Court of Appeals and the District Court held that it was unnecessary to consider the effect of this agreement because it afforded to the respondent trainmen the same rights as were afforded to them by the Selective Training and Service Act. (R. 61, 70)

Second Cause of Action

Petitioners' second cause of action also involves the conflicting claims of two groups of trainmen on the Maryland Division of respondent railroad. However, these conflicting claims relate to employment and seniority rights with regard to the Maryland Division's freight trainmen's seniority roster, rather than its passenger trainmen's seniority roster, with which the first cause of action is concerned.

As pointed out above, the petitioners are veterans who were trainmen in the passenger service of the Maryland Division when they left to enter the armed forces of the United States and who, upon their return, were re-employed as passenger trainmen and treated in every respect, including their position on the passenger trainmen's seniority roster, on the same basis as if they had continued in active service on the Maryland Division throughout the period of their military service. (R. 55-59)

The other group of trainmen, who have not been made parties to this proceeding, are trainmen in the freight ser-

vice of the Maryland Division who entered into such service while the appellants were in the military service. (R. 22) The group includes both non-veterans and veterans, those of them who are veterans having entered military service after plaintiffs did.

For their second and alternative cause of action, the petitioners allege that, in the event that the courts should decide the first cause of action in favor of respondents and adjudge it lawful for the respondent trainmen to have been transferred to passenger service and to have been accorded seniority status in such service ahead of those who joined the passenger service during their absence, the petitioners should likewise, under the Selective Training and Service Act of 1940, be given the opportunity to transfer from passenger service to freight service with greater seniority than those who entered the freight service during the period that the petitioners were serving with the armed forces. In support of this second cause of action the petitioners allege that some kind of notice should have been given to them with respect to applications being received for positions in freight service while they were in military service. (R. 22)

On the basis of the above allegations, the petitioners demand that, if the first cause of action be decided against them, the respondent railroad be compelled to tender to plaintiffs, at or some time after the time that such decision is rendered, an opportunity to transfer from the passenger service to the freight service with each of them to receive a seniority date on the freight trainmen's seniority roster ahead of all employees thereon who were accepted for freight service while the particular petitioner was in military service. (R. 23-24) Petitioners also demand that the respondent railroad be compelled to tender petitioners damages alleged to have been incurred by them by reason of respondent railroad's failure to accord petitioners the opportunity so to transfer, following their return to its employ from military service. (R. 24) However, there is

no allegation that any of the petitioners have ever asked for such a transfer; their Amended Complaint asks for the opportunity to decide whether so to transfer only if they lose out in the courts on the first cause of action. There is likewise no allegation, and no proof by affidavit or otherwise, that there was any custom and practice for men in the passenger service to transfer to freight service, when vacancies occurred in the freight service, on the basis of their seniority in passenger service, and the absence of any such custom and practice has been expressly recognized by both of the courts below. (R. 62, 71)

The District Court decided against petitioners on their second cause of action on the grounds that they had failed to show a custom and practice establishing a seniority right of transfer from passenger service to freight service and that in no instance would petitioners have elected to transfer from passenger to freight service if the opportunity to do so had been presented during the time that they were in military service. The District Court concluded that they therefore were not in the position of having been denied a valuable right of choice by reason of their war service. (R. 61-62)

The Court of Appeals affirmed in part and reversed in part the decision of the District Court on petitioners' second cause of action. The Court of Appeals held that the respondent railroad should be required to tender to the petitioners an opportunity to transfer from passenger to freight service corresponding to the opportunity granted to the respondent trainmen to transfer from freight to passenger service, with retroactive seniority, when they returned from military service. (R. 70-71) All the respondents have filed Conditional Cross-Petitions for Writ of Certiorari with respect to this portion of the decision of the Court of Appeals. (Cases Nos. 645 and 646, October Term, 1949) The Court of Appeals also held that the petitioners had failed to show a cause of action for damages under this second cause of action since there was nothing to show a

demand by any of the petitioners for transfer from passenger to freight service or a refusal by the respondent railroad to permit such transfer. (R. 71-72)

Statutes Involved.

Pertinent provisions of the Selective Training and Service Act of 1940 are set forth in the supplement to this Brief.

ARGUMENT.

I.

The instant case does not present any important question of law that requires or deserves the exercise of this Court's discretionary jurisdiction. It involves only the application to the particular facts of principles already defined by this Court.

These principles are that, under Sections 8(b) and 8(c) of the Selective Training and Service Act of 1940, the veteran returning from service with the armed forces is not to step back "on the seniority escalator at the point he stepped off . . . [but] at the point he would have occupied had he kept his position continuously during the war." *Fishgold* v. *Sullivan Drydock & Repair Corporation,* 328 U. S. 275, 284. In other words, he is "entitled by the Act to be restored not to a position which would be the precise equivalent of that which he had left when he joined the armed forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment." *Oakley* v. *Louisville & N. Railroad Co.,* 338 U. S. 278, 283; see also *Aeronautical Lodge* v. *Campbell,* 337 U. S. 521.

Applying these principles to the facts in the present case, both the District Court and the Court of Appeals decided that each respondent veteran was entitled, on his return from military service, to be accorded the privilege of trans-

fer from freight service to passenger service which he would have had if he had not been absent with the armed forces. This privilege, which was in fact accorded to him by respondent railroad, is the subject of petitioners' attack in their first cause of action.

The decision of the Court of Appeals in favor of respondents on this cause of action is based on the undisputed fact that (R. 69):

> "When additional passenger trainmen were needed, the established practice was to transfer to passenger service qualified trainmen in freigh service who made application for such transfer and who possessed the highest seniority in freight service."

The District Court's decision likewise emphasizes the significance of this "established custom." (R. 60, 62)

In addition, it may be noted, the applicable collective bargaining agreement expressly provides for transfers between the freight roster and the passenger roster. (R. 15, 66) It also provides that an employee returning from a furlough or leave of absence of thirty days or more may exercise his seniority on any assignment or pool advertised and filled during his absence.[2]

These facts alone distinguish the instant case from the cases which petitioners cite as being in conflict.[3] Thus, in

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[2] Rule 2-A-3(b) of the Agreement, Exhibit "A" to the Amended Complaint, on file with the clerk although not included in the printed record.

[3] The distinctions between "parallel" and "tandem" rosters, and between "promotion" and "transfer", which petitioners have urged in both courts below and now urge here, are utterly without significance. None of the cases cited makes any such distinction and neither does the language of the Selective Training and Service Act. The important fact is that, as the courts below have found (R. 61, 69), the respondent trainmen in this case lost out on a valuable benefit while they were away in military service, *viz.*, the privilege of electing whether or not to transfer to fill a vacancy in the passenger service. As soon as they returned from military service they promptly elected to so transfer and were properly permitted to do so.

Hewitt v. *System Federation No. 152 Ry. Employees' Dept. A.F.L.*, 161 F. (2d) 545 (C.C.A. 7th, 1947), the Circuit Court of Appeals emphasized that the car cleaners and the carman helpers, "by their collective bargaining agreement, had separate seniority rights among themselves, without a provision whereby an employee classified as a car cleaner might transfer and be classified as a carman helper on the basis of seniority rights" and that the trial court had found as a fact (161 F. (2d) at p. 547):

> "That petitioner at the time of his induction into the Armed Forces, had no right to promotion from the classification of car cleaners to the classification of carman helpers by virtue of any custom or written contract."

In view of this finding the Circuit Court of Appeals for the Seventh Circuit held that the trial court was in error in permitting the petitioner upon his return from military service to transfer to the class of carman helper with retroactive seniority in that class.

Similarly, in *Raulins* v. *Memphis Union Station Company*, 168 F. (2d) 466 (C.C.A. 6th, 1948), the trial court had found as a fact that the plaintiffs "had no fixed right to promotion from the position of electrician-helper to the position of electrician by virtue of any custom or by virtue of any contract, written or otherwise" and that other things, particularly qualifications, besides seniority as electrician-helper required consideration in filling vacancies on the electrician roster.

Special Service Co. v. *Delaney*, 172 F. (2d) 16 (C.C.A. 5th, 1949), and *Boston & Maine R. Co.* v. *David*, 167 F. (2d) 722 (C.C.A. 1st, 1948), also present situations where there was no evidence of any pre-existing agreement or custom to afford rights of promotion or transfer from one roster to another on the basis of seniority alone.

In *Trischler* v. *Universal Potteries, Inc.*, 78 F. Supp. 609 (S.D. Ohio, 1947), aff'd. 171 F. (2d) 707 (C.C.A. 6th, 1948), the trial court had found as a fact that under the estab-

lished practice an employee returning from furlough or leave of absence would not have been accorded the opportunity to fill an apprenticeship vacancy which would have been his had he been on active duty and that this active duty requirement was peculiarly important since the increasing proficiency obtained from experience on the job made for greater production in the plant and greater income to all piecework employees, whose volume of production depended in part on the volume of production of the apprentices. These facts find no parallel whatsoever in the facts of the present case.

Spearmon v. *Thompson, Trustee Mo. Pac. Ry. Co.*, 167 F. (2d) 626 (C.C.A. 8th, 1948), cert. den. 335 U. S. 822 (sub. nom. *Thompson, Trustee* v. *Spearmon*) and 335 U. S. 886 (sub. nom. *Delozier* v. *Thompson*), opinion on rehearing, 173 F. (2d) 452, likewise cited by petitioners as being in conflict with the decisions below in the instant case, also presents an entirely different fact situation from the one now under consideration. This decision, moreover, actually supports the decision of the Court of Appeals in the present case since the three successful plaintiffs there were permitted to exercise a valuable seniority right by making retroactively a choice which was afforded them by the applicable agreement and which necessarily had been postponed because of their absence in the armed forces, i.e., the opportunity at the end of three years' actual service as carman mechanics of choosing (a) to remain as mechanics and thus to acquire for the first time seniority on the mechanics' roster (with loss of all accumulated seniority on the carman helpers' roster) or (b) to return to the carman helpers' roster with the three years' probationary work as a mechanic to be counted as seniority on the helpers' roster.

All of the Circuit Court of Appeals decisions claimed by petitioners to be in conflict with the decision below in the instant case had been decided when this Court denied *certiorari* in *Chesapeake & Ohio Railroad Co.* v. *Morris*, 336 U. S. 967, opinions below, 171 F. (2d) 579 (C.C.A. 7th, 1949) and 75 F. Supp. 429 (N.D. Ind., 1947), the argument in sup-

port of that *certiorari* petition having been made on the same ground, of an alleged conflict among the circuits, which petitioners now urge. That case is on its facts more closely analogous to the present case than any of the decisions cited by petitioners and represents a square holding in favor of a returning veteran standing in a situation very similar to that of the respondent trainmen here on their return from military service. In upholding the lower court, the Circuit Court of Appeals said (171 F. (2d) at p. 580):

> "The issue is, can a qualified veteran who was returned to the position he left demand and receive by the authority of the Act the seniority in a better position which was acquired by a non-veteran with less seniority in the first position while the veteran was in service.
>
> "The District Judge determined this issue in favor of the veteran and we agree with his conclusion in the light of the instant facts that plaintiff had the right as an attribute of his position as telegrapher to bid for an advertised dispatcher's position, and that his military service legally excused him from his failure to bid for the two vacancies filled while he was in service by two men who were junior to him on the telegraphers' seniority roster.
>
> "We hereby adopt the opinion of Judge Swygert as the opinion of this court."

The instant case presents no new or different issue from that described in the foregoing quotation, and neither the record nor petitioners' argument shows any special factors warranting this Court's consideration of the instant case after having refused to take jurisdiction in the *Morris* case, *supra*, as well as in other recent cases involving these same general issues as applied to varying fact situations. *Thompson, Trustee* v. *Spearmon, supra,* 335 U. S. 822; *Delozier* v. *Thompson, Trustee,* 335 U. S. 886; *Dougherty* v. *General Motors Co.,* No. 518, Oct. Term, 1949, 18 U.S.L. Week 3233 (U. S. Feb. 13, 1949).

II.

The petitioners' demand for damages in connection with their second cause of action is completely unwarranted, and the denial of that demand by the Court of Appeals raises no significant issue for determination by this Court.

The claim for damages, and petitioners' entire second cause of action, were asserted for the first time in the Amended Complaint, filed December 17, 1947 (R. 10, 22-23), at which time petitioners, under any possible theory of the facts, certainly knew the full extent of the rights that they were attempting to assert both with respect to the passenger trainmen's seniority roster and with respect to the freight trainmen's seniority roster. In the Amended Complaint petitioners renewed with equal vigor, in their first cause of action, the contention that they were entitled to have the respondent trainmen placed below them on the passenger trainmen's seniority roster or even removed from that roster altogether.

If petitioners should be successful in that contention, which they continue to assert today notwithstanding the contrary decisions of the District Court and the Court of Appeals, their Amended Complaint makes it abundantly clear that they would have no interest whatsoever even in claiming the opportunity now to transfer from their present positions in passenger service to positions in freight service with retroactive seniority. Thus, the second cause of action in the Amended Complaint is by its very terms made "alternatively, and in the event the Court shall adjudge that the action of defendant [respondent] Railroad was lawful as to defendant [respondent] freight trainmen transferring to the passenger roster with passenger seniority accruing during their services in the armed forces . . ." (R. 22) The prayers in connection with the second cause of action are likewise made alternatively and in the event that the prayers in connection with the first cause of action be not granted. (R. 23)

In this state of the record, petitioners now contend, in effect, that in the event that this Court should decide in favor of respondents on the first cause of action, but only in that event, the petitioners should be awarded damages from the respondent railroad to compensate them for whatever losses they may have suffered as a result of remaining on the passenger roster instead of transferring to the freight roster. They assert that they are entitled to such damages "at the least" from the date of filing the Amended Complaint. (Petition, p. 21, fn. 4) In other words, petitioners assert that, if they should prove to be wrong in the course of action which they have been following, with advice of counsel, for the past two years and more, then petitioners should recover from the railroad "compensatory damages" covering at least that period for the losses which they sustained in following that course of action.

In describing the decision of the Court of Appeals on the second cause of action, petitioners state, inaccurately, that petitioners were held to have "wrongfully been denied an opportunity to transfer to the freight roster." (Petition, p. 12) Actually, the Court of Appeals held that "there is nothing to indicate a demand for transfer by appellants [petitioners] or a refusal by the Railroad to do so" (R. 71), and petitioners point for such a demand only to the Amended Complaint (Petition, p. 21, fn. 4) which, besides being expressly conditional as seen above, did not demand transfer but only the opportunity to decide, after an accounting and tender of damages, whether or not to transfer from passenger to freight service. It is not without significance that no petitioner has demanded transfer to the freight service in the period that has intervened since the judgment of the Court of Appeals on August 1, 1949.

In light of the above facts, which are undisputed, the reasoning contained in part 2 of the Petition is altogether

specious, and the decisions cited therein have no application to the present case.[4]

CONCLUSION.

For the reasons set forth above, it is submitted that the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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[4] In the present case the Court of Appeals decided as a matter of law that there was no basis for the claim for damages in connection with the second cause of action. (R. 71-72) In each of the cases cited by the petitioners where the appellate court returned the case to the trial court for the fixing of damages, the appellate court decided that there was a cause of action for damages but left it to the lower court to measure in the first instance the amount of the damages to be awarded, for the purpose of which additional evidence was usually required. It is also worthy of note herein that the decision of the Court of Appeals on this aspect of petitioners' second cause of action may be considered *pro tanto* an affirmance of the decision of the District Court. (R. 62, 71-72, 84).

SUPPLEMENT.

Relevant Statutory Provisions.

Section 8 of the Selective Training and Service Act of 1940, as amended, (54 Stat. 885, 891; 50 U. S. C. Appendix, § 308) provides in part as follows:

"(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3(b) [section 303(b) of this Appendix] shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the land or naval forces under this Act for training and service shall be given a physical examination at the beginning of such training and service; and upon the completion of his period of training and service under section 3(b) [section 303(b) of this Appendix], each such person shall be given another physical examination and, upon the written request of the person concerned, shall be given a statement of medical record by the War Department: Provided, That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary of War or the Secretary of the Navy would prove injurious to the physical or mental health of the person to whom it pertains.

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * * * * * * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the

benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: Provided, That no fees or court costs shall be taxed against the person so applying for such benefits.

* * * * * * * * * * "